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CITATIONS

410-751—70——1

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 534

UNITED STATES OF AMERICA, APPELLANT

v.

NORMAN GEORGE REIDEL

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES

OPINION BELOW

The district court issued no written opinion. Its oral explanation of its ruling is set out at pp. 12–16 of the Appendix.

JURISDICTION

On June 8, 1970, the United States District Court for the Central District of California entered an order (App. 16–17) dismissing a three-count indictment against appellee charging violations of 18 U.S.C. 1461, which prohibits the mailing of obscene materials. The court's ruling was based on its view that Section 1461 is unconstitutional as applied to the mailing of obscene material solicited from the sender by adults. A notice

of appeal to this Court under 18 U.S.C. 3731 was filed in the district court on July 8, 1970 (App. 17–18). Probable jurisdiction was noted by this Court on October 12, 1970 (App. 19). This Court has jurisdiction under 18 U.S.C. 3731 to review on direct appeal from a district court the dismissal of an indictment based upon the invalidity of the statute on which the indictment is founded. See, *e.g., United States v. Spector,* 343 U.S. 169; *United States v. Petrillo,* 332 U.S. 1.

QUESTION PRESENTED

Whether the federal statute prohibiting the mailing of obscene matter may constitutionally be applied to one who uses the mails for commercial distribution of obscene material to willing individual buyers who state that they are adults.

STATUTE INVOLVED

18 U.S.C. 1461 provides in pertinent part:

> Every obscene, lewd, lascivious, indecent, filthy or vile article, matter, thing, device or substance; * * * is declared to be nonmailable matter and shall not be conveyed in the mails or delivered from any post office or by any letter carrier.
>
> Whoever knowingly uses the mails for the mailing, carriage in the mails, or delivery of anything declared by this section to be nonmailable, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, or knowingly takes any such thing from the mails for

> the purpose of circulating or disposing thereof, or of aiding in the circulation or disposition thereof, shall be fined not more than $5,000 or imprisoned not more than five years, or both, for the first such offense, and shall be fined not more than $10,000 or imprisoned not more than ten years, or both, for each such offense thereafter. * * *

STATEMENT

On February 17, 1970, an advertisement appeared in the "East Village Other" (an "underground" newspaper) which stated (App. 2):

> IMPORTED PORNOGRAPHY—learn the true facts before sending money abroad. Send $1.00 for our fully illustrated booklet. You must be 21 years of age and so state. Normax Press, P.O. Box 989, Fontana, California, 92335.

A postal inspector, stating that he was an adult, sent $1.00 in response to this advertisement and received a booklet entitled "The True Facts About Imported Pornography"[1] (App. 2). Relying upon this booklet and information acquired by independent investigation (App. 2–4), the postal inspector obtained a search warrant for appellee's premises. Execution of this warrant disclosed a number of revised editions of the booklet as well as four original editions, two of which were in mailing envelopes which had been returned to the sender marked "undelivered." These and other

[1] A copy of this booklet was lodged with the Clerk of this Court at the time of the filing of the Jurisdictional Statement.

items were seized. As a result of the initial "test buy" and the search and seizure which followed, an indictment in three counts was returned against appellee charging violations of 18 U.S.C. 1461 (App. 5–6). Counts 1 and 2 were based upon the two booklets found on appellee's premises and charged mailings to the named addressees (App. 5); count 3 charged the mailing of the booklet to the postal inspector (App. 6).

Appellee moved to dismiss the indictment, contending that, both on its face and as applied, 18 U.S.C. 1461 was unconstitutional (App. 7–9). At the hearing on the motion to dismiss, the court stated that it would assume the booklets in question to be pornographic (App. 10, 15). The government stipulated that the booklet which was the subject of count 3 had been ordered by a postal inspector who was an adult and that it had no evidence that the booklets which were the subjects of counts 1 and 2 had not been solicited by adults (App. 11–12).[2] The court then dismissed the indictment (App. 13). In so doing, the court relied on this Court's recent decision in *Stanley* v. *Georgia*, 394 U.S. 557, which it interpreted as establishing a "right to receive" obscene material. Notwithstanding the express disavowal in *Stanley* (*id.* at 568) of any intent to impair the holding in *Roth* v. *United States*, 354 U.S. 476 (which sustained a con-

[2] The court thereafter indicated that the stipulation would be regarded as having been made as "an amendment to the indictment in response to a bill of particulars," a treatment in which counsel for both sides concurred (App. 14–15). Compare *United States* v. *Fruehauf*, 365 U.S. 146, 157.

viction under the precise statute here in issue), the court found it a necessary consequence of *Stanley* that individuals cannot be restricted from distributing obscene material commercially through the mails to adults who solicit such material (App. 13). Accordingly, although not holding the statute invalid on its face, the court dismissed the indictment as applied to this "particular prosecution" (App. 13–14).

SUMMARY OF ARGUMENT

This case is one of several involving the impact of this Court's recent decision in *Stanley* v. *Georgia,* 394 U.S. 557. The single issue raised here is whether that decision impairs the validity of the federal statute, 18 U.S.C. 1461, prohibiting the mailing of obscene matter.

This Court held that statute constitutional in *Roth* v. *United States,* 354 U.S. 476. While holding in *Stanley* that an individual could not be punished for merely possessing obscene matter, the Court expressly disclaimed any intent to impair the validity of *Roth* and similar cases dealing with commercial distribution of such matter. The court below nevertheless ruled that *Stanley* requires recognition of a right to obtain, and, correspondingly, a right to purvey obscenity. Consequently, it held that Section 1461 is unconstitutional, at least as applied to a commercial distributor who announces that he wishes only to sell to consenting adults.

We contend that *Stanley* has no such impact. That decision, we submit, was based on the constitutional

disability of government to intrude into a man's dwelling in order to seek to control the moral content of his thought. The individual's right not to have his private possession of obscenity subjected to state sanction does not extend any First Amendment protection to obscene material itself. The decision in *Stanley* does not, therefore, affect the long-established and proper authority of the federal government, recognized by *Roth,* to take measures designed to protect public morality, among them prohibiting the dissemination of obscenity through the mails.

ARGUMENT

I.

CONGRESS HAS THE POWER TO PROHIBIT USE OF THE MAILS FOR COMMERCIAL DISTRIBUTION OF OBSCENE MATTER

The constitutional power of Congress to "Establish Post Offices and post roads" and "to regulate Commerce with foreign Nations, and among the several States," Art. I, Section 8, includes full power to prohibit the mailing of obscene matter. Through the postal power, the commerce power, and its other enumerated powers, Congress long has enacted measures designed to promote the public health, morals, and welfare.[8] This Court has consistently approved such enactments. *E.g., Heart of Atlanta Motel, Inc.* v. *United States,* 379 U.S. 241, 256–257; *Roth* v. *United States,* 354 U.S. 476, 485 (quoting *Chaplinsky* v. *New Hampshire,* 315 U.S. 568, 571–572); *Hoke* v. *United States,* 227 U.S. 308, 322.

[8] Obscene matter has been banned from the mails for more than one hundred years. See 13 Stat. 504, 507.

Nearly one hundred years ago, the validity of a statute prohibiting the sending of lottery circulars through the mails was upheld in *Ex Parte Jackson,* 96 U.S. 727. Likening that statute to the one then in effect prohibiting the mailing of obscene matter, the Court said (96 U.S. at 736):

> In excluding various articles from the mails, the object of Congress has not been to interfere with the freedom of the press, or with any other rights of the people; but to refuse its facilities for the distribution of matter deemed injurious to the public morals. * * *

See also, *Champion* v. *Ames,* 188 U.S. 321, 357–358; *In re Rapier,* 143 U.S. 110, 134–135. In *Public Clearing House* v. *Coyne,* 194 U.S. 497, 506–508, the Court broadly reaffirmed the principles of *Ex Parte Jackson, supra,* sustaining the action of the Postmaster General in returning to the senders various letters addressed to organizations found to be engaged in a scheme to defraud. See also, *Donaldson* v. *Read Magazine,* 333 U.S. 178. And this Court's decision in *Hannegan* v. *Esquire, Inc.,* 327 U.S. 146, 158, expressly noted that "The validity of the obscenity laws is recognition that the mails may not be used to satisfy all tastes, no matter how perverted."

Relying upon this venerable line of authority, the Court, in *Roth* v. *United States, supra,* held constitutional the very statute, 18 U.S.C. 1461, which is challenged here. In answer to an attack based primarily upon First Amendment grounds, this court held that "obscenity is not within the area of constitutionally protected speech or press." 354 U.S. at 485. It there-

fore concluded that "the federal obscenity statute punishing the use of the mails for obscene material is a proper exercise of the postal power." 354 U.S. at 493. Nothing has occurred since that decision to warrant the conclusion that this exercise of the postal power no longer is proper.

II.

NOTHING IN THIS COURT'S DECISION IN *STANLEY* v. *GEORGIA* LIMITS THE EXERCISE OF THIS POWER TO PROHIBITING MAILINGS ONLY TO MINORS AND NONCONSENTING ADULTS

The court of appeals, relying upon this Court's decision in *Stanley* v. *Georgia,* 394 U.S. 557, made an exception to *Roth* and ruled that application of 18 U.S.C. 1461 would be unconstitutional in this case.[4] Interpreting *Stanley* as establishing a "right to receive" obscene material, the court reasoned that there must be a corresponding right to purvey it commercially, at least so long as the material is "solicited by adults" and "not directed at children, or * * * at an unwilling public" (App. 13).[5]

[4] The circumstances in *Roth* were virtually identical to those involved here. Two of the four counts there were based upon purchases by a postal inspector. Petition for a Writ of Certiorari, No. 582, O.T. 1956, p. 39. No question concerning the adult status of the inspector was raised in *Roth*, however.

[5] Although the advertisement involved in this case indicated that the booklet was available only to persons 21 and over, appellee made no effort to determine the identity or adult status of the individuals who placed the order. There was thus no guarantee that juveniles were effectively prevented from obtaining obscene matter. Similarly, it was possible for a person to purchase the booklet, and have it sent to an unwilling third party, as a prank.

We submit that the court below erred as to the impact of *Stanley*. Our views concerning the proper interpretation of that decision are set forth in our companion Brief in *United States* v. *Thirty-Seven (37) Photographs,* No. 133, this Term, pp. 9–17, and in our Brief as *amicus curiae* in *Byrne* v. *Karalexis,* No. 83, this Term, pp. 6–18, and we do not repeat those discussions here. In essence, it is our position that *Stanley* held only that government lacks the power to punish an individual for the possession of obscene material "in the privacy of * * * [his] own home." 394 U.S. at 564. The decision rests fundamentally on the right of the individual to be free from interference by government with such privacy and the "moral content of * * * [his] thoughts," 394 U.S. at 565. See also, *Griswold* v. *Connecticut,* 381 U.S. 479. But the right to be free from governmental interference with private possession of obscenity does not carry with it the right to obtain obscene material or to distribute it commercially, even to those desiring it.[6] It does not invest the obscene material itself with any greater protection under the First Amendment than it otherwise would have. In referring to First Amendment rights, the *Stanley* opinion is careful throughout

[6] We emphasize that the defendant in this case is a commercial distributor. It is possible that consensual, non-commercial correspondence which is sent through the mails would be immune under *Stanley* from seizure and use as the basis for prosecution. As this Court has been advised previously it is the government's policy not to prosecute such cases. *Redmond* v. *United States*, 384 U.S. 264; and see the Memorandum for the United States therein, No. 1056, O.T., 1965, pp. 3–4. But where, as here, the mails are being used for a commercial purpose, such prosecutorial abstention is not appropriate.

always to refer to those rights as associated with Mr. Stanley, the individual accused of crime, and not as giving any First Amendment protection to the material itself.

The right of the individual, in his private thoughts and dwelling, "to be let alone," *Olmstead* v. *United States,* 277 U.S. 438, 478 (Brandeis, J., dissenting); 394 U.S. at 564, thus does not limit the right of government to prohibit the commercial dissemination of obscene material even though such material cannot be disturbed once it has come to rest in the home. This, we believe, is shown by the fact that this Court, while holding that "the First and Fourteenth Amendments prohibit making mere private possession of obscene material a crime," also expressly admonished that "*Roth* and the cases following that decision are not impaired by today's holding." 394 U.S. at 568. These statements in *Stanley* are internally consistent. They imply, by their juxtaposition, an accommodation between the freedom of individuals in their private morality and the responsibility of the State to protect public morality.[7] The state cannot inquire into

[7] It cannot yet be said that the judgment that obscenity has a harmful effect on public morality is an irrational one. The question is not simply whether exposure to obscenity leads to the commission of sex crimes; society has a proper interest in maintaining public confidence in its own fabric, and may enforce that interest so long as the materials against which it is enforced are not "protected speech." Even the prior issue is not settled; as the recent *Report of the Commission on Obscenity and Pornography* itself recognized, research to date has been brief, tentative, and scanty. "We do not demand of legislatures 'scientifically certain criteria of legislation.' *Noble State Bank*

the contents of a man's library—an inquiry which inevitably involves supervision of the morality of his own, individual thoughts. *Poe* v. *Ullman*, 367 U.S. 497, 547 (Harlan, J., dissenting). But its disability to engage in this personal intrusion in no way requires it to condone the distribution and availability of materials which it legislatively deems inimical to the public welfare. We conclude, therefore that there is nothing in *Stanley* warranting the limitation of or overruling the principles firmly established in *Roth*.

CONCLUSION

For the reasons stated, it is respectfully submitted that the judgment of the district court should be reversed and the cause remanded with directions to reinstate the indictment.

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DECEMBER 1970.

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v. *Haskell*, 219 U.S. 104, 110." *Ginsberg* v. *New York*, 390 U.S. 642, 643. And the legislature could properly believe that not only adults are here involved; it is far harder to guard against transactions involving minors through the mails than over-the-counter, where a purchaser can be confronted face to face (p. 8, n. 5, *supra*).

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